ORIGINAL

STATE OF MICHIGAN

IN THE SUPREME COURT

MICHAEL FRANCIS SPITZLEY, ~~and~~ Personal Representative of
THE ESTATE OF DAVID SPITZLEY,

Plaintiff-Appellee,

vs.

THOMAS P. SPITZLEY and
KIMBERLY S. SPITZLEY

Defendant-Appellants.

Supreme Court
No.:

Court of Appeals
No.: 255345 Opn 12/1/05
Rec 2/7/06

Clinton Circuit No.:
2003-009578-CZ

J. Martlew

OK

130585
APPL
3/21
29149

NOTICE OF HEARING

DEFENDANT-APPELLANTS'

APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

Michael A. Faraone PC (P45332)
Attorney for Defendant-Appellant
617 North Capitol Avenue
Lansing, Michigan 48933
Telephone: (517) 484-5515

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Case Law

Statutes

Court Rules

Other Authority

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Appellants were sued for damages and reformation of a deed. On October 24, 2003 the trial court summarily dismissed Appellants' responsive pleadings and awarded reformation of the deed. Appellees' *complaint for damages* went forward. On April 15, 2004 the trial court issued an order awarding a sanction. On May 5, 2004 Appellants filed a Claim of Appeal. On December 1, 2005 the Court of Appeals issued a written opinion affirming the sanction. On February 7, 2006 the Court of Appeals entered a denial of a motion for reconsideration, Judge Michael R. Smolenski dissenting.

This application seeks leave to appeal or peremptory reversal of the December 1, 2005 and February 7, 2006 decisions of the Michigan Court of Appeals. Under MCR 7.302(B)(3), this appeal involves a legal principle of major significance to Michigan jurisprudence - whether a fiduciary may silently retain a *personal* interest in property, even after they convey the same property in a *fiduciary* capacity. If the trial court's reasoning stands, it undermines the public's ability to rely upon deeds. Under MCR 7.302(B)(5), the justness of the imposition of the sanction should be reviewed, or peremptorily reversed, because the imposition of the sanction was clearly erroneous under Michigan law regarding sanctions and Michigan law regarding real property, and it has caused a material injustice.

QUESTION PRESENTED

ISSUE

APPELLANTS RESPECTFULLY REQUEST LEAVE TO APPEAL OR PEREMPTORY REVERSAL ON EITHER OF THE FOLLOWING SUB-ISSUES. WHETHER A FIDUCIARY MAY SILENTLY RETAIN A PERSONAL INTEREST IN PROPERTY, EVEN AFTER THEY CONVEY THE PROPERTY IN THEIR FIDUCIARY CAPACITY. COUNSEL CITED FOREIGN LAW HOLDING THAT A FIDUCIARY CONVEYS THEIR PERSONAL INTEREST IN PROPERTY EVEN WHEN SIGNING A DEED AS A FIDUCIARY. (28 Am Jur 2nd Estoppel and Waiver §12 and §289). NO CONTRARY MICHIGAN LAW ON THIS SPECIFIC POINT HAS EVER BEEN CITED. THE SECOND SUB-ISSUE IS WHETHER THE IMPOSED SANCTION WAS FAIR, GIVEN THAT IT IS BASED ON THE TRIAL COURT'S OPINION ON AN OPEN QUESTION OF MICHIGAN LAW.

The Trial-Court answered: No.

Defendant-Appellant answers: Yes.

The Court of Appeals answered: No.
[With one Judge dissenting on the denial of reconsideration].

SUMMARY

This case arises from a dispute over property conveyed in a quit claim deed from a decedent's estate. (**Exhibit A**). The address "212 W. Oak Street" encompasses both a house on a partial acre *and* 40-acres of unproductive "farm land." Appellants would argue that all of this property was conveyed to them from the estate. Appellees would argue that only the house and partial acre were conveyed; that Appellee Michael Spitzley owned the 40-acres individually; and that his "mistaken" inclusion of the 40-acres in a personal representatives deed to Appellants was void.

Appellees took the sale proceeds and then sued Appellants for return of the property and "damages". They prevailed and obtained a sanction. **(Exhibit B).** The trial court's reasoning for the sanction was that a fiduciary retains any *personal* interest in property they have even after they convey the same property in a *fiduciary* capacity. [T. 6/7/04 at 11-12]. No Michigan law has ever been cited to support that holding. The Court of Appeals, in their written opinion, acknowledged Appellants' citation of foreign law that rejected that holding. (**Exhibit C;** the denial to reconsider is attached hereto as **Exhibit D).**

Among the documentary evidence that supports the Appellants you will find a September 2002 purchase agreement (**Exhibit E**) for **$109,000.00,** ($77,000.00 after credit for one Appellant being an heir of the estate), for the common address "212 W. Oak Street." The May 2001 appraisal indicates a sale price of **$83,000.00**. Appellees got away with relying upon a May 2001 purchase agreement for **$65,000.00** that was obviously never followed. Consider also a written letter from the estate's original attorney saying that the disputed property *belonged to the estate*. **(Exhibit F).**

The sanction in this case is clearly unjust and ought to be reversed.

STATEMENT OF FACTS

On April 25, 2000 David Spitzley conveyed by deed to himself and Michael Spitzley, as joint tenants with rights of survivorship, all of the above-said property. David Spitzley died on March 29, 2001. Michael Spitzley was named co-Personal Representative of his estate, along with his sister Lisa Spitzley-Klien.

On May 31, 2001 the estate agreed to sell to Appellants the property located at 212 W. Oak Street for $65,000.00. This is the purchase agreement that Appellees have relied upon in advancing their claims. *But that agreement was obviously never followed*. The eventual sale price was $109,000.00 ($77,000.00 even after a credit).

Before the closing, the estate's attorney, Gary Kasenow, issued a letter stating that the disputed 40-acres was an estate asset. That it did not belong to Michael Spitzley as an individual. (**Exhibit F** at para. 1). The personal representatives deed itself clearly conveyed all of the disputed property. **(Exhibit A).** It was only *after the closing* that substitute counsel for the estate, attorney William Jackson, for the first time informed Appellants that he considered the 40 acres to *not* belong to the estate, that it belonged to Michael Spitzley as an individual.

Appellants testified at deposition that Michael Spitzley added the 40 acres to the sale in exchange for the higher sale price, and that the amended signed purchase agreement was sent to the estate's attorney. (Depositions at p 8-9, 13-15 filed below). On May 27, 2004 after the trial judge had entered the sanction, that signed purchase agreement surfaced inside the title company. It references "212 W. Oak Street" without any exclusion of the disputed property. **(Exhibit E).**

In their complaint for reformation of the deed and money damages,[1] Appellees

[1] The Court of Appeals' opinion leaves the false impression that Appellees did not expressly request money damages in their complaint.

argued that Michael Spitzley signed **Exhibit A** only in his capacity as co-personal representative of the estate, that the disputed 40-acres was "not an estate asset," and therefore that it was never conveyed. In other words, Appellees could silently retain with one hand, what they appeared to be conveying with the other. The lower court agreed and, without taking any testimony, summarily dismissed Appellants' pleadings and awarded Appellees a $6,655.02 sanction against Appellants *and their counsel.*

Other items of documentary evidence entered into the record include a statement from Mark Spitzley, a sibling of all the parties except of course Kimberly Spitzley. He states that Michael Spitzley was unhappy about a mortgage he assumed on the disputed property, and that he sold that property to Appellants. **(Exhibit G).** There is an affidavit from Cameron Chapin, branch manager of the bank that holds the mortgage on the property assumed by Appellants. He states that loan documentation indicates that Appellants assumed a mortgage on the disputed property. **(Exhibit H;** the mortgage is attached hereto as **Exhibit K).** There is an affidavit from Theresa A. Jacobs, the closing agent in this matter. She states that Appellees were given ample time to review the deed they each signed, and contrary to their testimony there was no indication of their being rushed or confused. **(Exhibit I).**

Appellants now respectfully request leave to appeal on either or both of the following issues: One, whether a fiduciary may silently retain a *personal* interest in property, even after they convey the same property to someone else in a *fiduciary* capacity. No Michigan law was cited on this specific issue and it appears to be an open question in Michigan law. Or two, whether the imposed sanction was just, given that the basis for it was one trial court's opinion over an open question of Michigan law.

ARGUMENT

ISSUE

DEFENDANTS' POSITION WAS SUPPORTED BY DOCUMENTARY EVIDENCE. COUNSEL HAD NO REASON TO TELL HIS CLIENTS TO CAPITULATE TO THE PLAINTIFFS' UNREASONABLE DEMAND FOR THE PROPERTY AND MONEY. COUNSEL CITED MICHIGAN AND FOREIGN LAW HOLDING THAT A FIDUCIARY CONVEYS THEIR PERSONAL INTEREST IN PROPERTY EVEN WHEN SIGNING A DEED AS A FIDUCIARY. (28 Am Jur 2nd Estoppel and Waiver §12 and §289). NO CONTRARY MICHIGAN LAW HAS EVER BEEN CITED.

APPELLANTS RESPECTFULLY REQUEST LEAVE TO APPEAL OR PEREMPTORY REVERSAL ON EITHER OF THE FOLLOWING SUB-ISSUES. WHETHER A FIDUCIARY MAY SILENTLY RETAIN A PERSONAL INTEREST IN PROPERTY, EVEN AFTER THEY CONVEY THE PROPERTY IN THEIR FIDUCIARY CAPACITY. OR, WHETHER THE IMPOSED SANCTION WAS JUST GIVEN THAT IT IS BASED ON THE TRIAL COURT'S OPINION ON AN OPEN QUESTION OF MICHIGAN LAW.

Standard of Review and Issue Preservation. Under MCR 7.302(B)(3), the first sub-issue would involve a legal principle of major significance to the states jurisprudence - whether a fiduciary may silently retain a *personal* interest in property, even after they convey the same property in a *fiduciary* capacity. If the trial court's reasoning stands, it undermines the public's ability to rely upon written deeds. Under MCR 7.302(B)(5), the justness of the imposition of the sanction should be reviewed, or peremptorily reversed, because the imposition of the sanction was clearly erroneous under Michigan law regarding sanctions, and it has caused a material injustice. Both of these sub-issues were preserved below and are referenced in the Court of Appeals opinion.

Discussion

The trial court stated its reason for the sanction. It turned on the capacity of the fiduciary to retain a personal interest in the conveyed property. The trial judge stated: "[T]he Court has previously determined that the Plaintiff Estate did not have

ownership of said parcel." At a June 2004 hearing: "[T] he estate couldn't convey something it didn't own to begin with. And, at the time of David Spitzley's death, he didn't own the farm property. ... I think the matter of the Court's award comes back down to the merits of the principle case, which the Court has just commented on." [T. 6/7/04 at 11-12].

When the Court of Appeals writes that no documentary evidence supported the Appellants, it is factually incorrect and it is an assertion that the trial court itself did not make after **Exhibit E** surfaced. That is, the actual final purchase agreement. This appeal centers on a very straightforward issue: whether it was frivolous for Appellants to argue that a fiduciary conveys any *personal* interest in property they may have when signing a deed in a *fiduciary capacity*. The Court of Appeals acknowledged in its written opinion that Appellants cited favorable foreign law; but then the opinion makes an oblique reference to contrary Michigan law, which it never cites.

The Capacity of a Fiduciary to Deed Property

No Michigan law has ever been cited, by any court or by the opposing side, during this entire proceeding, which holds that a fiduciary can in silence retain a personal interest in property they appear to be conveying in their capacity as a fiduciary. On the other hand, the Appellants cited the cases collected at 28 Am Jur 2nd Estoppel and Waiver §12 and Deeds §289.

> **§12 Conveyance in representative or fiduciary capacity**
>
> Generally, a person who, acting in a representative capacity, executes a conveyance of land, without reservations, which purports to convey the entire property or the fee in the property, or which represents that the title is in another, is estopped to claim in his individual capacity an interest in the property. Thus, agents, corporate officers, guardians, trustees, and executors and administrators have been held to be estopped by executions of conveyances in the foregoing representative capacities to assert any individual interest in the property. [Citations omitted].

§289 Deed by personal representative or agent

> Where a grantor, acting as executor or administrator of a decedent, assumes to convey an estate by deed warranting or importing a representation that he has good right to convey the entire estate, he is estopped from subsequently asserting that the estate conveyed did not pass by his deed. The deed will be held to pass any interest in the land that the grantor may have had in his individual capacity at the time of the deed as heir or otherwise in his own right. [Citations omitted].

Michigan Real Property Law

Existing Michigan case law *suggests* that Michigan would join the majority of jurisdictions on this subject. In Michigan, where the owner of property executes a deed, the deed is valid even if the owner uses a fictitious name.[2] In Michigan, a deed signed as "husband and wife" where the woman knew she was not grantor's wife, created no issue regarding the validity of the deed.[3] A grantor's failure to read a deed is attributable to grantor alone.[4] Deeds should be strictly construed against the grantor so as to give grantee the greatest estate that the deed's terms will permit.[5] The burden of establishing mutual mistake is upon the party who seeks reformation; the evidence must be convincing and clear.[6]

Analysis

We do not understand why the sanction was imposed or why it was affirmed. I cited existing Michigan case law. Why is it that the law applied to other attorneys and other litigants in other cases was not being applied to this case?

Appellees outrageously demanded return of the real property plus thousands of dollars in "damages," under the theory that they (the estate) never owned the real property. **The estates inventory, at the time of the closing, listed the property.**

---

2 Price v National Union, 294 Mich 289; 293 NW2d 652 (1940).
3 Franklin v Franklin, 354 Mich 543; 93 NW2d 321 (1959).
4 Christenson v Christenson, 126 Mich App 640; 337 NW2d 611 (1983).
5 Thomas v Steuernol, 185 Mich App 148; 460 NW2d 577 (1990).
6 Burns v Caskey, 100 Mich 94, 100-101; 58 NW 642 (1894); Youell v Allen, 18 Mich 107, 109 (1869).

No one told my clients that anything was being held back until *after* the closing. The original estate's counsel, before the closing, wrote to the heirs to tell them that the disputed property had not yet passed to Michael Spitzley. He wrote:

> (1) The 40 acres of farmland and farm buildings in Westphalia shall be given to Michael Spitzley but he must pay off ½ of the mortgage balance owed, the other beneficiaries would pay off the other ½. [Letter from Gary Kasenow dated July 18, 2001; attached hereto as **Exhibit F**].

Attorney Jackson waited until *after* the closing to propound the new position of the estate – that the disputed property had passed to Michael Spitzley upon the death of his father and that the deed did not convey the property it stated it conveyed. (Dep. Of Thomas Spitzley at 18, 22). The closing occurred *after* crops had been planted. By May 2003, the Appellants realized that Michael Spitzley was planting for a new season. (Dep. Of Thomas Spitzley at 20, 24). So, they came to my office.

According to the trial court, I should have then told the Appellants to give the 40 acres to Michael Spitzley by reformation of the deed he had prepared and signed, and that they should get their checkbook out in order to satisfy the Appellees' demand for money. The demand, by memory, never went lower than $12,000.00. In fifteen years of practicing law, this is the most unjust outcome I have had a client experience. It is the only sanction my office has been made a part of. There is no justice in this outcome.

The Law on Sanctions

The pertinent question is whether a sanctioned party's position was *arguable*.[7] A claim is frivolous when (1) the party's primary purpose was to harass, embarrass, or injure the prevailing party; (2) the party had no reasonable basis to believe that the

---

[7] MCL 600.2591(3)(a)(iii); MSA 27A.2591(3)(a)(iii); LaRose Market, Inc. v Sylvan Center, Inc., 209 Mich App 201, 210; 530 NW2d 505 (1995).

underlying facts were true; or (3) the party's position was devoid of arguable legal merit.[8] None of these three prongs is applicable.

- The trial court stated that Defendants and their counsel did nothing to "personally offend" the court and prong one was never cited by the court. (T 6/7/04 at 11).
- Prong two is inapplicable because we did have a reasonable basis to believe our factual allegations. For example, the documents discussed throughout this brief, such as the letter from the estate's first attorney.
- Prong three is inapplicable because only the Appellants cited law on the legal issue pertinent to the sanction. Even the Court of Appeals cited no law, other than general law applicable to sanctions.

The attached unpublished opinion in Crawford v Canada Creek, COA No. 231261 (2003) is pertinent. (**Exhibit L**). There, the Court of Appeals, in rejecting sanctions, emphasized that the prevailing party's own conduct "contributed to the bringing of the action." Assuming *arguendo* that Appellees are correct that a mutual mistake occurred, *they contributed to that problem* when they created the deed. My clients *were not even present* for the closing. They relied upon and trusted the estate, administered by their brother and sister.

MCR 2.114(D) imposes an "affirmative duty on each attorney to conduct a reasonable inquiry into the validity of a pleading before it is signed." Attached hereto, and filed below, are affidavits from the loan officer, the title agent, a sibling, and Appellees themselves. (**Exhibit G, H, I, J**). If you refuse to consider reversing the

[8] Yee v Shiawassee County Bd of Comm'rs, 251 Mich App 379, 407; 651 NW2d 756 (2002).

sanction, then at least consider reversing the inclusion of the undersigned. The sanction on me is unjustifiable.

Conclusion

The partial acre encompasses one line in the legal description. The disputed 40 acres encompasses paragraphs. If Appellees did not intend to convey that property, the Appellees should have been able to spot it by looking at the deed. If you boil this controversy down, the Appellees claim that they did not read what they signed while represented by counsel. As a result of their mistakes, I stand sanctioned for a defense made to their claim for damages. Appellees also brought an action against the title company. So they have had quite a payday for their negligence or fraud in drafting the deed. There is no justice in this outcome, and we respectfully ask this Court to intervene by either granting leave or peremptorily reversing.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Defendant-Appellants, Thomas P. Spitzley and Kimberly S. Spitzley, husband and wife, respectfully ask this Court to either grant them leave to appeal, or peremptorily reverse the sanction imposed below or, in the alternative, reverse the sanction insofar as it was imposed on counsel.

Respectfully submitted,

Dated: February 26, 2006

Michael A. Faraone (P45332)
Attorney for Defendant-Appellant
617 North Capitol Avenue
Lansing, Michigan 48933
Telephone: (517) 484-5515